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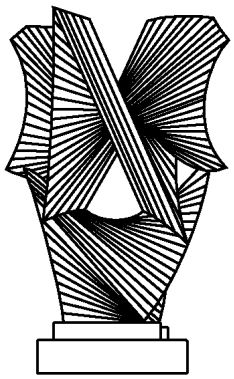

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I. Introduction

It is often said that the nondelegation doctrine is dead.[1] According to the familiar refrain,[2] the doctrine was once used to require Congress to legislate with some clarity, so as to ensure that law is made by the national legislature rather than by the executive. But the nondelegation doctrine—the refrain continues—is now merely a bit of rhetoric, as the United States Code has become littered with provisions asking one or another administrative agency to do what it thinks best.[3] While this is an overstatement, it captures an important truth: Since 1935, the Supreme Court has not struck down an act of Congress on nondelegation grounds, notwithstanding the existence of a number of plausible occasions.[4]

But is the nondelegation doctrine really dead? On the contrary, I believe that the doctrine is alive and well. It has been relocated rather than abandoned. Federal courts commonly vindicate not a general nondelegation doctrine, but a series of more specific and small, though quite important, nondelegation doctrines. Rather than invalidating federal legislation as excessively open-ended, courts hold that federal administrative agencies may not engage in certain activity unless and until Congress has expressly told them to do so. The relevant choices must be made legislatively rather than bureaucratically. As a technical matter, the key holdings are based not on the delegation doctrine but on certain "canons" of construction.

What I mean to identify here is the *nondelegation canons,* not organized or recognized as such, but central to the operation of

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[1] See John H. Ely, Democracy and Distrust 131-33 (1981).

[2] See id. at 131-34.

[3] See David Schoenbrod, Power Without Responsibility (1995).

[4] See below for a brief overview.

modern public law. These are nondelegation canons for the simple reason that they forbid administrative agencies from making decisions on their own.[5] Consider a few examples. Congress must affirmatively authorize the extraterritorial application of federal law[6]; agencies cannot exercise their ordinary discretion, under an ambiguous statutory provision, so as apply national law outside of American borders. A clear congressional statement to this effect is required. Administrative agencies are not permitted to construe federal statutes in such a way as to raise serious constitutional questions; if the constitutional question is substantial, Congress must clearly assert its goal of venturing into the disputed terrain.[7] When treaties and statutes are ambiguous, they must be construed favorably to Native American tribes; the agencies' own judgment, if it is an exercise of discretion, is irrelevant.[8] As we will see, there are many more examples, including a recent canon forbidding agencies to impose high costs for trivial gains.

In this Essay I have two purposes, descriptive and normative. The descriptive purpose is to show how certain canons of construction operate as nondelegation principles. My aim is to unify a set of seemingly disparate cases and to suggest that they actually construct a coherent and flourishing doctrine, amounting to the contemporary nondelegation doctrine.

The second and normative purpose is to show that such canons, though highly controversial, should be understood as entirely legitimate. The nondelegation canons have crucial advantages over the more familiar nondelegation doctrine insofar as they are easily administrable, pose a less severe strain on judicial capacities, and risk far less in the way of substantive harm. The nondelegation canons represent a salutary kind of democracy-forcing minimalism, designed to ensure that certain choices are made by institutions with a superior

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[5] Some canons are described as "clear statement" principles, so labeled because they require a clear statement from Congress. See, e.g., William Eskridge, Dynamic Statutory Interpretation 282-83 (1995). The nondelegation canons are all clear statement principles; but many clear statement principles are not nondelegation canons, because they do not involve agencies at all. See note infra.

[6] EEOC v. Arabian American Oil, 499 US 244 (1991) (extraterritoriality).

[7] See Bowen v. Georgetown Univ Hospital, 488 US 204 (1988).

[8] Muscagee Nation v. Hodel, 851 F.2d 1439 (DC Cir 1988) (construction in favor of Native Americans).

democratic pedigree.[9] Indeed, the nondelegation canons turn out to be a contemporary manifestation of the founding effort to link protection of individual rights, and other important interests, with appropriate institutional design.[10] In certain cases, Congress must decide the key questions on its own. This is the enduring function of the nondelegation doctrine, and it is endorsed, not repudiated, by current law.

II. The Conventional Nondelegation Doctrine: One Good Year[11]

Despite its exceptionally infrequent use, the conventional nondelegation doctrine—the doctrine that has been displaced by the contemporary nondelegation canons—should be quite familiar. In a nutshell, it requires Congress to state an "intelligible principle" by which to guide and limit agency action.[12] The motivating idea is that Article I, section 1[13] vests legislative power in the Congress and that this vesting cannot be waived, even if Congress and the public want to waive it. If Congress gives the executive a "blank check," or states no intelligible principle, it has violated Article I. Sometimes the nondelegation doctrine is thought to diminish the risk of rent-seeking, or legislation that reduces social welfare, by requiring a legislative consensus on details before permitting the enactment of law.

According to the standard view, the nondelegation doctrine was a core part of the original Constitution, and its abandonment, in the aftermath of the New Deal, represented a kind of capitulation to

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[9] On minimalism and democracy-forcing minimalism generally, see Cass R. Sunstein, One Case At A Time (1999).

[10] See Williams Bessette, The Mild Voice of Reason 5-27 (1995).

[11] In this section I draw on a companion paper, Cass R. Sunstein, Is the Clean Air Act Unconstitutional?, Michigan Law Review (forthcoming November 1999), which focuses on issues of EPA discretion and regulatory policy, and which offers a brief discussion of the basic claims of this essay.

[12] See, e.g., Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737 (DC 1971)

[13] U.S. Const., Art. 1. Section 1.

perceived national needs.[14] But this view is much too simple. There is no unambiguous textual barrier to delegations—no constitutional provision says that the legislative power is nondelegable—and in fact there is no explicit evidence that the framers and ratifiers of the original Constitution believed that it contained a nondelegation doctrine.[15] Actually the early practice suggested considerable willingness to "delegate" authority. In the very first year of the Republic, Congress gave the President the power to grant licenses to trade with the Indian tribes "under such rules and regulations as the President shall prescribe."[16] The first Congress also provided for military pensions "under such regulations as the President of the United States may direct."[17] In neither case did Congress issue standards by which to limit the President's discretion.

The standard view also fits uncomfortably with judicial practice. It is often remarked that the Supreme Court last used the nondelegation doctrine to invalidate a federal statute in 1935. What is less often remarked is that the Court first used the nondelegation doctrine to invalidate to federal statute in exactly the same year. While earlier cases had suggested the existence of a nondelegation doctrine,[18] the Court upheld a number of broad delegations,[19] and

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[14] See David Schoenbrod, Power and Responsibility (1997); John Hart Ely, Democracy and Distrust 131-34 (1981); Gary Lawson, The Rise and Rise of the Administrative State, 100 Harv. L. Rev. (1995).

[15] Consider in this regard the treatment of the interpretive question in Ernest Gellhorn, Returning to First Principles, 36 Am. U L Rev 345. 347-48 (1987), which attempts to show the constitutional roots of the nondelegation (a) by showing that John Locke believed in a nondelegation principle, (b) by emphasizing that the framers believed in Locke's contractarian view, and (c) by referring to the Constitution's provision for lawmaking. None of this establishes that the framers accepted a nondelegation doctrine. I use this example because Gellhorn is one of the outstanding administrative law scholars of the last thirty years, and also an enthusiast for the nondelegation doctrine; his inability to show a direct constitutional source for the doctrine shows that any judgment on its behalf is largely a matter of inferences.

[16] 1 Stat. 137.

[17] 1 Stat. 95.

[18] The Brig Aurora, 11 US 382 (1813); Field v. Clark, 143 US 649 (1892); United States v. Grimaud, 220 US 506 (1911); JW Hampton, Jr. v. US, 276 US 394 (1928).

[19] See, eg, US v. Grimaud, 220 US 506 (1911); JW Hampton, Jr. v. US, 276 US 394 (1928).

hence for the first 138 years of the nation's existence—as well as the last 64 years—no Supreme Court decision struck down a statute on nondelegation grounds. By way of preface to the contemporary nondelegation canons, let us briefly explore the two decisions of 1935, the conventional nondelegation doctrine's only good year.

In *Panama Refining Co. v. Ryan*,[20] the Court invalidated a section of the National Industrial Recovery Act, saying that "the President is authorize to prohibit the transportation in interstate commerce" of oil priced in violation of state-imposed production quotas. The Court concluded that the defect lay in the absence of standards specifying exactly when the President was to exercise this power.[21] This is a controversial ruling, fitting poorly with post-World War II decisions,[22] and it is most unlikely that the Court would follow it today. But the largest decision, one that has not been overruled even implicitly, was *Schechter Poultry Co. v. United States*,[23] where the Court invalidated the National Industrial Recovery Act as a whole.[24] In invalidating the Act, the Court made four critical points. *First*, the statutory standards were open-ended and self-contradictory—no constraint at all on government approval of "codes."[25] From the statutory language, it was very hard to generate ceilings and floors on governmental action. *Second*, the Court said that the Act essentially delegated public power to private groups.[26] Congress could not legitimately authorize private persons to create law in their preferred form. Because accountable officials did not "filter" efforts at private lawmaking, this did not merely raise the spectre of faction, it was the thing itself—the cooptation of public power by self-interested private groups.[27] *Third*, the Court distinguished other statutes, most notably the Federal Trade

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[20] 293 U.S. 388 (1935).
[21] Id. at 395.
[22] See below.
[23] 295 US 495 (1935).
[24] It is an interesting historical fact that on the day of the decision, President Roosevelt did not seem much to object to judicial invalidation of a centerpiece of his New Deal, apparently on the theory that the NIRA experiment had been a failure. See Kenneth C. Davis, FDR: The New Deal Years (1988).
[25] 295 U.S. at 523.
[26] Id. at 537.
[27] Id.

Commission Act and the Federal Communications Act, partly by reference to the procedural safeguards provided by those statutes. "What are 'unfair methods of competition' are thus to be determined in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest. To make this possible, Congress set up a special procedure."[28] *Fourth*, the statute at issued covered the entire economy, no mere sector, and thus placed the economy itself at the mercy of decisions essentially unlimited by legislative instructions.

In the decades since *Schechter Poultry*, however, nondelegation challenges have been routinely repudiated.[29] Indeed, the Court has upheld some apparently extreme grants of authority to the executive branch.[30] To be sure, there have been a few conflicting signals. In the most visible opinion in what is generally known as the Benzene Case, then-Justice Rehnquist suggested that Occupational Safety and Health Act should be struck down on nondelegation grounds.[31] Notably, Justice Stevens' plurality opinion also referred to the nondelegation doctrine, not to invalidate the Act but as a tool of statutory construction.[32] In the plurality's view, the agency's position would allow the agency such massive power over the private sector as to be a possibly unconstitutional delegation of power.[33] Partly for this reason, the Court read the statute to require OSHA to show a "significant risk" before it could undertake regulation.[34] For the plurality, then, the nondelegation doctrine operated as a kind of "clear statement" principle, or canon of construction rooted in nondelegation concerns, requiring Congress to speak unambiguously if it sought to give (what the Court saw as) open-ended authority to

[28] Id. at 533.
[29] See, eg, Yakus v. US, 321 US 414 (1944); Lichter v. US, 334 US 742 (1948); US v. Southwestern Cable Co, 392 US 157 (1968); Mistretta v. US, 488 US 361 (1988).
[30] See Yakus, supra; Southwestern Cable Co., supra; Mistretta, supra.
[31] Industrial Union Department v. API, 448 US 607, 684 (1980) (Rehnquist, J., dissenting).
[32] Id. at 646.
[33] Id. at 646.
[34] Id. at 651.

administrators.[35] As we will see, Justice Stevens' plurality opinion created a fresh nondelegation canon, one that fits well with my general thesis here, and one that carries considerable independent importance.

In the immediate aftermath of the Benzene Case, there were occasional lower court suggestions that the nondelegation doctrine was "no longer . . . moribund."[36] A handful of lower courts cases have recently invoked the doctrine. Thus in *Massieu v. Reno*,[37] a distict court struck down a provision of a federal deportation statute saying that "an alien whose presence or activities in the United States the Secretary of State has reasonable grounds to believe would have potentially serious adverse foreign policy consequences for the United States is deportable." On the court's view, this was an open-ended grant of power, because the notion of "potentially serious adverse foreign policy consequences" could be construed in numerous different ways, thus raising a risk of arbitrariness. And in *South Dakota v. Department of Interior*,[38] a court of appeals invalidated the Indian Reorganization Act insofar as it authorized the secretary of the Interior "in his discretion, to acquire . . . any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians." But these are extremely unusual cases, and it is unlikely that other courts would follow them, even on identical facts.[39]

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[35] There is much reason to question the plurality's analysis. OSHA did not urge that it could do whatever it wanted; it did not say that the statute allowed it to regulate on whatever terms it chose. On the contrary, it said whenever there was an identifiable risk to workers, the statute required OSHA to regulate to the point where compliance was not feasible. This is a severe, even draconian statute, not so different from the Delaney Clause, which barred any carcinogens in food additives. 21 USC 376(b)(5)(B). But a draconian statute is not an open-ended delegation of authority. If Congress told the EPA, eliminate any pollutant that causes any risk at all, EPA's discretion would be sharply constrained.

[36] Fort Worth & Denver v. Lewis, 693 F.2d 432, 435 n. 8 (5th Cir. 1982).

[37] 915 F. Supp. 681 (D.N.J. 1996).

[38] 69 F.3d 878 (DC Cif 1995,.

[39] See Mistretta v. United States, 488 US 361 (1988).

A. What, If Anything, Is The (Conventional) Nondelegation Doctrine For?

The opinions of Justice Rehnquist and the plurality in the Benzene Case have spurred renewed interest in the conventional nondelegation doctrine, and many observers have argued for its revival.[40] There has thus been a spirited debate over what purposes, democratic, economic and otherwise, that such a revival would serve, and whether, in light of those purposes, a revival would be justified.[41] I briefly discuss that debate, principally to show fatal problems with any large-scale judicial use of the doctrine, and to pave the way toward an understanding of the nondelegation canons as the far superior alternative.

1. The conventional doctrine defended

It is possible to isolate several arguments on behalf of the conventional doctrine. First and foremost, the doctrine is designed to promote a distinctive kind of accountability—the kind of accountability that comes from requiring specific decisions from a deliberative body reflecting the views of representatives from various states of the union. This is hardly to say that the executive branch lacks accountability; of course the President, who is authorized to oversee most administrative behavior, is subject to the will of people.[42] But the nondelegation doctrine should be associated less with accountability in the abstract than with the particular constitutional goal of ensuring a deliberative democracy, one that involves not only accountability but also certain forms of bargaining and above all reflectiveness.[43] The vesting of lawmaking power in Congress is designed to ensure the combination of deliberation,

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[40] See Schoenbrod, supra note; Theodore Lowi, Two Roads to Serfdom: Liberalism, Conservatism, and Administrative Power, 36 Am. U. L.Rev. 295 (1987).

[41] Leading discussions include Schoenbrod, supra note 65; Symposium, 36 Am. U. L. Rev. 277 (1987); Jerry Mashaw, Chaos, Greed, and Governance (1998); Peter Aranson, Ernest Gellhorn, and Glen Robinson, A Theory of Legislative Delegation, 68 Cornell L Rev 1 (1982).

[42] As emphasized in Jerry Mashaw, supra note, at 145-48, 152-56.

[43] See William Bessette, The Mild Voice of Reason (1994). On deliberative democracy generally, see Deliberative Democracy (Jon Elster ed. 1998); Jurgen Habermas, Between Facts and Norms (1996).

bargaining, and accountability that comes from a guarantee that government power cannot be brought to bear on individuals unless diverse representatives, from diverse places, have managed to agree on the details. It is notable here that the President emerges from a "winner-take-all" contest, a sharp contrast to Congress, where local majorities, but national minorities, are allowed to have some say in lawmaking. Consider, as an extreme contrast, the early decision by the German legislature to confer on Adolf Hitler the power to rule by "decree"; this delegation made possible lawmaking exercises that would otherwise have been extremely cumbersome, and hence removed an important check on arbitrary rule.[44]

A closely related point has to do with the extent to which law and particularly national legislation sometimes amount to an infringement on liberty. If no law may be brought to bear against the public unless diverse members of Congress have been able to agree on a particular form of words, then there is, on one view, an important safeguard of freedom. The underlying idea is that people may not be subject to national legal constraints unless and until there has been specific legislative authorization for the constraints. This idea can in turn be associated with social contract theory, allowing people to maintain certain private law rights unless there has been explicit authorization for what would otherwise be a common law wrong.[45] Indeed, a prominent if now largely discredited[46] canon of

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[44] See David Currie, The Constitution of the Republic of Germany 109 (1995).

[45] See Stephen Breyer et al., Administrative Law and Regulatory Policy 27 (4th ed. 1999). There is, however, a problem with this conception of freedom, a particular problem in the aftermath of the New Deal: Why should we think that the status quo embodies freedom, and that the new law at issue would threaten to abridge freedom? It is far from clear, for example, that the common law system for regulating pollution—itself a regulatory system, and anything but prepolitical—should be taken as an embodiment of liberty, and that a Clean Air Act is a liberty-threatening abridgement of that freedom. Compare the area of discrimination: Is a law forbidding discrimination on the basis of race, sex, or disability something that threatens liberty, such that it is crucial to obtain legislative agreement on its details, lest liberty be threatened? Or might the discriminatory status quo be the real threat to freedom? Questions of this kind seem to me to raise serious doubts about the idea that a strictly enforced nondelegation doctrine would promote liberty, properly conceived. On the general topic of status quo neutrality, see Cass R. Sunstein, The Partial Constitution (1993).

construction—requiring express legislative authorization for interference with common law rights[47]—is a close cousin of this idea; it qualifies as the core nondelegation canon of the early twentieth century.

A related point has to do with social welfare. If we believe that legislation is at least often an effort by self-interested private groups to redistribute wealth or resources in their favor, the nondelegation might be seen as welfare-promoting, insofar as it raises the cost of legislation. On this view, the idea that legislation may not be enacted unless there is a consensus to this effect (as reflected in agreement on statutory requirements) is a safeguard against welfare-reducing legislation, increasing the likelihood that statutes will do more good than harm. On this view, more stringent enforcement of the nondelegation doctrine would promote social welfare (economically defined), by reducing the number of inefficient statutes, and by increasing the likelihood that enacted law will be efficient. The nondelegation doctrine might even be understood as an institutional cousin of a provision that directly prohibited inefficient legislation (as some people understand the Takings Clause, for example).

The conventional nondelegation doctrine also promotes rule of law values. Indeed, the doctrine can be understood as a kind of "backdoor" void-for-vagueness doctrine, serving the same fundamental goals.[48] It does this, first, by promoting planning by those subject to law, giving them a sense of what is permitted and what is forbidden. The result is to reduce the cost of litigation and seeking legal advice. It does this, second, by cabining the

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[46]Note, however, that in Norfolk Redevelopment and Housing Authority v. Chesapeake & Potomoc Tel. Co., 104 S. Ct. 304, 307 (1983), the Court described the canon as "well-established."

[47] See, e.g., FTC v. American Tobacco CO., 264 US 298, 305-06 (1924); FTC v. Eastman Kodak Co., 274 US 619, 623-25 (1927); Felix Frankfurter and Nathan Greene, The Labor Injunction 168-82 (1930); Roscoe Pound, Common Law and Legislation, 21 Harv L Rev 383 384, 387-88 (1908).

[48] Similarly, the void for vagueness doctrine might be seen as a backdoor nondelegation doctrine, requiring a legislature to speak with clarity. Both doctrines are also cousins of the plain meaning rule in statutory construction, see John Manning, Textualism As A Nondelegation Principle, 97 Colum. L. Rev 673 (1997). They are also closely connected with the project of democracy-forcing minimalism. See Sunstein, supra note.

discretionary authority of enforcement officials, who might otherwise act abusively or capriciously. These points can be collected with the suggestion that the conventional nondelegation doctrine reflects the Constitution's commitment to dual-branch lawmaking—a commitment that limits arbitrary power, and promotes deliberation as well as accountability, by ensuring that governmental authority can be exercised only when both the legislature and the executive (ordinarily authorized to decline enforcement) have made a particular decision to that effect. As we will see, this commitment underlies the nondelegation canons as well.

2. Against the conventional doctrine

Those who challenge the conventional doctrine emphasize several points. A large part of their concern is institutional, involving judicial competence rather than the doctrine on its merits.[49] The difference between a permissible and impermissible delegation—between "legislative" and "executive" conduct—is one of degree, not one of kind. It is for this reason that Justice Scalia, among others, has urged that in its conventional form, the nondelegation doctrine is largely unenforceable by the federal judiciary, simply because it is not subject to principled judicial application.[50] Any serious effort to enforce the nondelegation doctrine is likely (ironically) to increase uncertainty of an important kind, by forcing people to guess, without clear antecedent guidance, about how much legislative vagueness is constitutionally forbidden. With a little hyberbole, we might even suggest that in the hands of judges, the nondelegation doctrine is itself likely to be void for vagueness.

These are institutional points; other objections cut deeper against the doctrine. Sometimes Congress has good reasons to delegate. It may lack relevant information, not only about pollutants and the changing telecommunications market, but also about the social consequences of one or another approach to regulation. It may

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[49] See Richard B. Stewart, Beyond Delegation Doctrine, 36 Am. U. L. Rev. 323, 324-28 (1987).

[50] Se Mistrtta v. United States, 488 U.S. 361, 375 (Scalia, J., concurring). Justice Scalia's skepticism about judicial implementation of the nondelegation doctrine fits very well with his skepticism about rule-free law. See Antonin Scalia, A Matter of Interpretation 5-15 (1997).

be aware of the existence of rapidly changing circumstances, which may make any particular approach increasingly anachronistic. For a multimember body, there are serious problems in achieving closure on any particular course of action; the result can be to push law in the direction of incompletely specified abstractions.[51] These points are independent of the phenomenon of delegating to escape the political consequences of specificity, a phenomenon that undoubtedly plays a large role as well.[52]

The latter point is often taken as a reason for invigorating the nondelegation doctrine in the name of accountability[53]; but Jerry Mashaw has raised the possibility that administrators should be making political decisions, precisely on grounds of accountability.[54] As Mashaw notes, agencies are themselves politically accountable through their relationship to the President. Indeed, public choice theory may well suggest that Congress is more, not less, susceptible to factional power than bureaucrats acting under the arm of the President. There is evidence that factions are most influential precisely when Congress legislates with particularity.[55] There is no evidence that social welfare is more likely to be produced via specific instructions rather than via general ones.

Indeed, the view that the conventional nondelegation doctrine would promote social welfare is undermined not only by the risk by greater rent-seeking via clear legislation, but also in light of the fact that it is highly speculative to suggest that social welfare is, in general, likely to be promoted by reducing the total volume of law. Often law promotes social welfare, whatever content we give to that contested term. In any case this issue cannot be resolved in the abstract. And it is hard to come up with any a priori reason why decisions by agencies under vague language would be worse, from the standpoint of promoting social well-being, than decisions by agencies under more specific language from Congress. Indeed, it is

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[51] See Aranson et al., supra note; Cass R. Sunstein and Edna Ullmann-Margalit, Second-Order Decisions, Ethics (forthcoming 1999); Cass R. Sunstein, Legal Reasoning and Political Conflict (1996).
[52] See Aranson et al., supra note.
[53] See id.; Schoenbrod, supta note.
[54] See Mashaw, supra note.
[55] See Bruce Ackerman and William Hassler, Clean Coal/Dirty Air (1983).

not clear that from any point of view, things have gone systematically better when Congress is clear than when Congress is not.[56]

3. A general conclusion

In light of these considerations, there is no plausible case for a broad-scale revival of the nondelegation doctrine. A reinvigoration of the conventional doctrine would pose serious problems of judicial competence, and it would not be a sensible response to any of the problems and pathologies of the modern administrative state.[57] There is no reason to think that such a reinvigoration would ensure better regulatory policy, or even that it would mark a significant improvement in terms of democratic values.

None of this means that the nondelegation doctrine deserves to play no role at all in the constitutional regime. Contrary to Mashaw's suggestion, administrators are often weakly accountable to the President (or the electorate). By virtue of its composition Congress has a distinctive kind of accountability, and the special form of political accountability anticipated by Article I, section 1 does call for limitations on executive discretion. But outside of the most egregious cases,[58] this requirement is best promoted not by the conventional doctrine but by the nondelegation canons—the real place where contemporary American law recognizes a nondelegation doctrine, and where that doctrine now flourishes.

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[56] See Stewart, supra note.

[57] If we ask about promoting public welfare, or about agency reputation for competence and fair-dealing, it appears unimportant to know whether Congress has spoken with clarity. The Interstate Commerce Commission, for example, was one of the least well-respected agencies (at least between 1950 and 1980 or so), and it operated under open-ended statutory terms; the Securities and Exchange Commission is highly regarded, though its organic statute is similarly open-ended. The Department of Agriculture is one of the least well-regarded agencies, and the statutes it administers are frequently all too clear. The Internal Revenue Service is highly regarded, at least among those who study administrative agencies, and many of the provisions that it must enforce are highly detailed. In short: There seems to be no link between clear statutory terms and agency competence or agency contribution to social well-being. See id.; in the same spirit, see Breyer, supra note.

[58] Schechter Poultry is an obvious example here.

III. Hidden Nondelegation Principles

Let us turn now to a question that bears directly on the current status of the nondelegation doctrine: What is the authority of administrative agencies to interpret the law? When Congress has spoken clearly, everyone agrees that agencies are bound by what Congress has said. The disputed question has to do with the authority of agencies to act when Congress has not spoken clearly. Of course a strong version of the nondelegation doctrine would suggest that agencies can, in such cases, do nothing, because the underlying grant of power is effectively void. But short of this conclusion, what is the allocation of authority to agencies?

A. The Chevron *Canon: Aggravating the Delegation Problem?*

The place to start is of course *Chevron v. NRDC*,[59] the decision that dominates modern administrative law.[60] There the Supreme Court held that unless Congress has decided the "precise question at issue," agencies are authorized to interpret ambiguous terms as they see fit, so long as the interpretation is reasonable.[61] *Chevron* creates a familiar two-step inquiry. The first question is whether Congress has directly decided the precise question at issue. The second question is whether the agency interpretation is reasonable. Indeed, *Chevron* establishes a novel canon of construction[62]: In the face of ambiguity, statutes mean what the relevant agency takes them to mean.

This is an emphatically prodelegation canon, indeed it is the quintessential prodelegation canon, and some critics have suggested that *Chevron* is highly objectionable on nondelegation grounds.[63] On this view, the problem is that under *Chevron*, agencies are not merely given authority that is often open-ended; they are also permitted to interpret the scope of their own authority, at least in the face of ambiguity.[64] A regime in which agencies lacked this authority

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[59] 467 US 837 (1984).

[60] The literature is immense. For an overview, see Stephen Breyer et al., Administrative Law and Regulatory Policy 64-70 (4th ed. 1999).

[61] 467 US at 841.

[62] See Antonin Scalia, Judicial Review of Administrative Interpretations of Law, 1989 Duke LJ 511.

[63] See Cynthia Farina, Statutory Interpretation and the balnace of Power in the Administrative State, 89 Colum. L. Rev. 452 (1989).

[64] See id.

would—it might be claimed—fit better with nondelegation principles, for under such a regime, agencies would lack the power to construe statutory terms on their own. On this view, the key point, explicitly recognized in the case and by its most enthusiastic defenders, is that *Chevron* holds that statutory ambiguities are implicit delegations of interpretive (realistically, law-making) authority to agencies.[65] The opposing view—that ambiguities are not delegations at all—would fit better with the constitutional structure.

The weakness of this objection stems from the fact that when statutory terms are ambiguous, there is no escaping delegation. By hypothesis Congress has not been clear, perhaps because it has been unable to resolve the issue, perhaps because it did not foresee it. The recipient of the delegation will be either agencies or courts. If *Chevron* is rejected, ambiguous terms will be construed by judges rather than administrators, and in neither event will hard questions be made legislatively. *Chevron* does increase the discretionary authority of agencies—this is the sense in which it creates a prodelegation canon—but only in relation to courts. With respect to the nondelegation question itself, understood through the lens of Article III, it is neither here nor there.

B. Trumping Chevron: *Three Categories of Nondelegation Canons*

It is plain, however, that a variety of canons of construction—what I am calling nondelegation canons—trump *Chevron* itself.[66] In other words, the agency's interpretation of law does not, under current doctrine, prevail if one of the nondelegation canons is at work. These canons impose important constraints on administrative authority, for agencies are not permitted to understand ambiguous provisions to give them authority to venture in certain directions; a clear congressional statement is necessary. The nondelegation canons fall in three principal categories. An important qualification: I do not mean endorse each of the canons here. The goal at this stage is descriptive, not normative—to see how

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[65] 467 US at 838-845; see also Scalia, supra note, at 518-22.

[66] See, e.g., Bowen v. Georegtown Univ. Hosp., 488 US 204 (1988). This is the tendency of current law with respect to all of the nondelegation canons discussed here, but the tendency is, in some cases, little more than that, and on the conflict with *Chevron*, there are some conflicts in the lower courts. I do not discuss these conflicts here.

they operate as a constraint on administrative power and to understand how they are justified in practice. It does not matter if particular canons would turn out, on reflection, to be indefensible.

1. Constitutionally inspired nondelegation canons

A number of nondelegation canons have constitutional origins. They are designed to promote some goal with a constitutional foundation. Consider, as the most familiar example, the (controversial[67]) idea that agencies will not be permitted to construe statutes in such a way as to raise serious constitutional doubts.[68] Notice that this principle goes well beyond the (uncontroversial) notion that agencies should not be allowed to construe statutes so as to be unconstitutional. The notion appears to be that for constitutionally sensitive questions (e.g., whether a statute would intrude on the right to travel, violate the right to free speech, or constitute a taking) will not be permitted to arise unless the constitutionally designated lawmaker has deliberately and expressly chosen to raise them. The only limitations on the principle are that the constitutional doubts must be serious and substantial, and that the statute must be fairly capable of an interpretation contrary to the agency's own.[69] So long as the statute is unclear, and the constitutional question serious, Congress must decide to raise that question via explicit statement. This idea trumps *Chevron* for that very reason. Executive interpretation of a vague statute is not enough when the purpose of the canon is to require Congress to make its instructions clear

Belonging in the same category is the idea that administrative agencies will not be allowed to interpret ambiguous provisions so as to preempt state law.[70] The constitutional source of this principle is the evident constitutional commitment to a federal structure, a commitment that may not be compromised without a congressional decision to do so—an important requirement in light of the various safeguards against cavalier disregard of state interests created by the

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[67] Richard Posner, Federal Courts: Crisis and Reform 285 (1995).
[68] See note supra.
[69] See Rust v. Sullivan, 500 US 173 (1991).
[70] See National Association of Regulatory Utility Commissions v. FCC, 880 F.2d 422 (DC Cir 1989).

system of state representation in Congress.[71] Notice that there is no constitutional obstacle to national preemption; Congress is entitled to preempt state law if it chooses. But there is a constitutional obstacle of a sort: the preemption decision must be made legislatively, not bureaucratically.[72].

As a third example, consider the notion that unless Congress has spoken with clarity, agencies are not allowed to apply statutes retroactively, even if the relevant terms are quite unclear.[73] Because retroactivity is disfavored in the law,[74] Congress will not be taken to have delegated to administrative agencies the authority to decide the question. The best way to understand this idea is as an institutional echo of the notion that the due process clause forbids retroactive application of law.[75] Of course the constitutional constraints on retroactivity are now modest; while the ex post facto clause forbids retroactive application of the criminal law, the clause is narrowly construed, and Congress is generally permitted to impose civil legislation retroactively if it chooses.[76] But there is an institutional requirement here. Congress must make that choice explicitly and take the political heat for deciding to do so. It will not be taken to have attempted the same result via delegation, and regulatory agencies will not be taken to have the authority to choose retroactivity on their own. Perhaps part of the motivation here is uncertainty about the failure to apply the ex post facto clause, or the due process clause, so as to call into constitutional question some retroactive applications of civil law.

Consider, finally, the rule of lenity, which says that in the face of ambiguity, criminal statutes will be construed favorably to criminal

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[71] See Herbert Wechsler, The Political Safeguards of Federalism, 54 Colum L. Rev 543 (1954), for the classic discussion. A recent treatment is Larry Kramer, 100 Colum. L. Rev. (forthcoming 2000).

[72] It is not entirely clear whether an agency might be able to decide the question if Congress expressly said that the agency is permitted to do so. This raises a general point about the nondelegation canons: What would happen if Congress attempted to bypass them by a clear statement of delegation? I take up this question below.

[73] Bowen v. Georegtown Univ. Hosp., 488 US 204 (1988).

[74] Id. at 208.

[75] The notion is defended in Richard Epstein, Takings (1985).

[76] See Usery v. Turner Elkhorn Mining, 438 US 1 (1976).

defendants. One function of the lenity principle is to ensure against delegations. Criminal law must be a product of a clear judgment on Congress' part. Where no clear judgment has been made, the statute will not apply because merely it is plausibly interpreted, by courts or enforcement authorities, to fit the case at hand. The rule of lenity is inspired by the due process constraint on conviction pursuant to open-ended or vague statutes. While it is not itself a constitutional mandate, it is rooted in a constitutional princple, and serves as a time-honored nondelegation canon.

2. Structurally inspired nondelegation canons

The second category of nondelegation canons contains principles that lack a constitutional source but that have a structural foundation in widespread understandings about the nature of governmental authority. Consider here the fact that agencies are not permitted to apply statutes outside of the territorial borders of the United States.[77] If statutes are to receive extraterritorial application, it must be as a result of a deliberate congressional judgment to this effect. The notion here is that extraterritorial application calls for extremely sensitive judgments involving international relations; such judgments must be made via the ordinary lawmaking process (in which the President of course participates). The executive may not make this decision on its own.

For broadly related reasons, agencies cannot interpret statutes and treaties unfavorably to Native Americans.[78] Where statutory provisions are ambiguous, the government will not prevail. This idea is plainly an outgrowth of the complex history of relations between the United States and Native American tribes, which have semi-sovereign status; it is an effort to ensure that any unfavorable outcome will be a product of an explicit judgment from the national legislature. The institutional checks created by congressional structure must be navigated before an adverse decision may be made. Consider, as a final if more controversial illustration, the fact that agencies are not permitted to waive the sovereign immunity of the

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[77] EEOC v. Arabian American Oil, 499 US 244 (1991)

[78] See Ramah Navajor Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997); Willimas v. Babbitt, 115 F.2d 657 (9th Cir. 19970): Tyonek Native Corp. v. Interior, 836 F.2d 1237 (9th Cir. 1988).

United States, and indeed statutory ambiguity cannot be used by agencies as a basis for waiver, which must be explicit in legislation.[79] Sovereign immunity is a background structural understanding, defeasible only on the basis of a judgment to that effect by the national legislature.

3. Nondelegation canons inspired by perceived public policy

The final set of nondelegation canons is designed to implemented perceived public policy, by, among other things, giving sense and rationality the benefit of the doubt—and by requiring Congress itself to speak if it wants to compromise policy that is perceived as generally held.

There are many examples. Exemptions from taxation are narrowly construed[80]; if Congress wants to exempt a group from federal income tax, it must express its will clearly. A central idea here may be that such exemptions are often the product of lobbying efforts by well-organized private groups, and thus a reflection of factional influence; hence agencies may not create such exemptions on their own. At the same time, there is a general federal policy against anticompetitive practices, and agencies will not be permitted to seize on ambiguous statutory language so as to defeat that policy.[81] If Congress wants to make an exception to the policy in favor of competition, it is certainly permitted to do so. But agencies may not do so without congressional instruction. So too, it is presumed that statutes providing veterans' benefits will be construed generously for veterans, and agencies cannot conclude otherwise.[82] This idea is an analogue to the notion that statutes will be construed favorably to Native Americans; both require a congressional judgment is a group perceived as weak or deserving is going to be treated harshly

In decisions of particular importance for the modern regulatory state, agencies are sometimes forbidden to require very large expenditures for trivial or de minimis gains.[83] If Congress wants to be

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[79] US Department of Energy v. Ohio, 112 S Ct 1627, 1633 (1992).
[80] US v. Wells Fargo Bank, 108 S CT 1179, 1183 (1988).
[81] Michigan Citizens for an Indep Press v. Thornburgh, 868 F.2d 1285, 1299 ((DC Cir. 1989).
[82] King v. St. Vincent;'s Hos., 112 S. Ct. 812 (1992).
[83] See Industrial Union v. API, 463 US 29, 54-55 (1980) (plurality opinion); Corrosion Proof Fittings v. EPA, 947 F2d 1201 (th Cir 1991); Alabama Power v.

"absolutist" about safety, it is permitted to do so by explicit statement.[84] But agencies will not be allowed to take ambiguous language in this direction. This is a novel nondelegation principle, a creation of the late twentieth century. It is an evident response to perceived problems in modern regulatory policy.[85]

4. Barriers, catalysts, and minimalism

How intrusive are the nondelegation canons? What kind of judicial role do they contemplate? Canons of this sort might well be understood not as barriers but as catalysts, allowing government to act so long as it does so through certain channels. The effort is to trigger democratic (in the sense of legislative) processes and to ensure the forms of deliberation, and bargaining, that are likely to occur in the proper arenas.

In a sense this understanding—of nondelegation canons as catalysts—is correct. So long as government is permitted to act when Congress has spoken clearly, no judicial barrier is in place.[86] In this way, the nondelegation canons are properly understand as a species of judicial minimalism, indeed democracy-forcing minimalism, designed to ensure that judgments are made by the democratically preferable institution.[87] As compared with more rigid barriers to

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Cosle, 636 F,2d 323, 36-61 (DC Cir 1979); Monsanto Co v. Kennedy, 613 F.2d 947, 955-56 (DC Cir 1979). In a famous essay, Karl Llewellyn contended that the canons of construction were indeterminate and unhelpful, see Karl Llewellyn, Remarks on the Theory of Appellate Decision and the Rules of Canons about How Statutes Are To Be Construed, 3 Vand. L. Rev. 395 (1950). There has been a vigorous debate over whether Llewellyn was right, see, e.g., Antonin Scalia, A Matter of Interpretation (1998) (rejecting Llewellyn's claim). Even if Llewellyn is right, his argument does not undermine the nondelegation canons, which go in a single direction: against agency discretion. Of course it will be possible that other canons, for example those involve syntax, will support the agency's view of the statute.

[84] See Public Citizen v. Young, 831 F2d 1108 (DC Cir 1987) (finding no de minimis exception under the Delaney Clause).

[85] See Stephen Breyer, Breaking the Vicious Circle 10-17 (1993) (discussing the problem of "the last 10%").

[86] Compare Hampton v. Mow Sun Wong, 426 US 88 (1976), holding that the Civil Service Commission could not decide to exclude aliens from the civil service, but leaving open the question whether Congress or the President could do so.

[87] On minimalism generally, see Cass R. Sunstein, One Case At A Time (1999).

government action, the conventional nondelegation doctrine itself is a form of minimalism insofar as it requires Congress to speak with clarity and does not disable the government entirely. And because the nondelegation canons are narrower and more specifically targeted—requiring particular rather than general legislative clarity—they are more minimalist still.

But this understanding misses an important point. Nondelegation canons are barriers, and not merely catalysts, with respect to purely administrative (or executive) judgment on the matters in question. They erect a decisive barrier to certain discretionary decisions by the executive. In this respect, at least, the relevant institutions are blocked.

This point raised a final issue, involving the status of the nondelegation canons: Suppose that Congress expressly delegates to administrative agencies the authority to decide (for example) whether a statute may be applied outside the territory of the United States, or whether a statute should be construed favorably to Native Americans, or whether a statute ought to be understood to create a serious constitutional case. Would such a delegation be unconstitutional? No clear authority answers this question, for Congress has never attempted to do anything of this sort. But at first glance, a delegation of this kind would not seem by itself to violate the conventional nondelegation doctrine, as currently understood, so long as Congress has not given the agency a general "blank check," which courts are loathe to find.[88] Thus the answer appears to be that the nondelegation canons are merely tools of construction, and that they should not be taken to forbid Congress from delegating expressly if it chooses.

On the other hand, the Court suggested otherwise in the only decision that at all bears on this question. In *Hampton v. Mow Sun Wong*,[89] the Supreme Court actually held that the due process clause forbids the Civil Service Commission from deciding on its own to ban aliens from working for the United States Civil Service.[90] In the Court's view, that decision must be made by Congress or the President; it cannot be made by agencies alone. The *Hampton*

[88] See note supra.
[89] 426 US 88 (1976).
[90] Hampton v. Mow Sun Wong, 426 US 88 (1976).

decision has had no progeny, and outside of very unusual circumstances,[91] the Court would be most unlikely to say that Congress cannot delegate to agencies the power of decision, even in sensitive areas, if it chooses to do so expressly. But notice that Congress must take the political heat that would undoubtedly be generated by any such explicit delegation, a point that helps account for Congress' failure to delegate authority of that kind. And notice too that in cases in which a constitutional right is plausibly at stake, the Court might invoke *Hampton* and strike down the delegation on due process grounds.

IV. Canons Reconceived and Redeemed

A. Judicial Administrability and Congressional Lawmaking

Canons of the sort I have defended here are highly controversial. Judge Posner, for example, fears that some of them create a "penumbral Constitution," authorizing judges to bend statutes in particular directions even though there may in fact be no constitutional violation.[92] But if the argument here is correct, there is a simple answer to these concerns: The relevant canons operate as nondelegation principles, and they are designed to ensure that Congress decides certain contested questions on its own. If this idea is a core structural commitment of the Constitution, there can be no problem with its judicial enforcement.

We can go further. As briefly noted above, there are serious problems with judicial enforcement of the conventional nondelegation doctrine. A central difficulty here is institutional, involving judicial competence rather than the doctrine on its merits.[93] The distinction between a permitted and a prohibited delegation is one of degree rather than one of kind, depending on the quantum of allowed discretion, and that question is not easily subject to principled judicial enforcement. The difficulty of drawing these lines makes it reasonable to conclude that for the most part, the ban on

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[91] *Hampton* involved such circumstances: a wholesale exclusion of noncitizens from a huge classes of jobs. See 426 US at 92-94.

[92] See Richard Posner, Federal Courts: Crisis and Reform 285 (1995).

[93] See Richard B. Stewart, Beyond Delegation Doctrine, 36 Am. U. L. Rev. 323, 324-28 (1987).

unacceptable delegations is a judicially underenforced norm, and properly so.[94] From the standpoint of improving the operation of the regulatory state, it is also far from clear that general judicial enforcement of the doctrine would do much good; for reasons given above, it might even produce considerable harm.

Compare, along the relevant dimensions, judicial use of the nondelegation canons. Here the institutional problem is far less severe. Courts do not ask the hard-to-manage question whether the legislature has exceeded the permissible level of discretion, but pose instead the far more manageable question whether the agency has been given the discretion to decide something that (under the appropriate canon) only legislatures may decide. In other words, courts ask a question about subject matter, not a question about degree. Putting courts to one side, the nondelegation canons have the salutary function of ensuring that certain important rights and interests will not be compromised unless Congress has expressly decided to compromise them. Thus the nondelegation canons lack a central defect of the conventional doctrine: While a reinvigorated nondelegation doctrine would not improve the operation of modern regulation, it is entirely reasonable to think that for certain kinds of decisions, merely executive decisions are not enough.

If, for example, an agency is attempting on its own to apply domestic law extraterritorially, we might think that whatever its expertise, it is inappropriate, as a matter of democratic theory and international relations, for this to happen unless Congress has decided that it should. Or courts might reasonably believe that retroactive application of regulatory law is acceptable not because the executive believes that an ambiguous law should be so construed, but if and only if Congress has reached this conclusion. This judgment might be founded on the idea that political safeguards will ensure that Congress will so decide only if there is very good reason for that decision. For those who believe that retroactivity is constitutionally unacceptable, this may be insufficient consolation. But a requirement that Congress make the decision on its own is certainly less likely to make abuses less common, if they are legitimately characterized as abuses at all. Many of the canons discussed above fall within this

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[94] Lawrence Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1213-28 (1978).

basic account—above all, perhaps, the idea that agencies may not raise serious constitutional questions on their own.

This point has the considerable advantage of understanding the nondelegation canons as a modern incarnation of the framers' basic project of linking individual rights and interests with institutional design.[95] The link comes from providing protection of certain rights and interests not through a flat judicial ban on governmental action, but through a requirement—that certain controversial or unusual actions will occur only with respect for the institutional safeguards introduced through the design of Congress. There is thus a close connection between the nondelegation canons and a central aspiration of the constitutional structure.

It would be possible to object at this point that the nondelegation canons will, in practice, operate as more than presumptions. At least in most cases, congressional inertia, and multiple demands on Congress' time, will mean that the result ordained by the canon will prevail for the foreseeable future. If this is the case, nondelegation canons will not "force" legislative deliberation but simply produce a (judicially preferred?) result. But there are three problems with this objection. First, Congress will sometimes respond to the judicial decision by legislating with clarity; this has happened many times in the past. Second, the nondelegation canons—to deserve support—must rest on something other than judicial policy preferences; they must have some kind of foundation in concerns by the sort identified above. Third, there is nothing to lament about a situation in which, for example, statutes may not be applied retroactively, or extraterritorially, without congressional authorization, and in which Congress is unable to muster the will to give that authorization. If the argument here is correct, the outcome ordained by the nondelegation canon should prevail unless Congress has said otherwise.

B. Qualifications and Futures

There are some important limitations to the argument here. Of course many canons, including those here, operate even when

[95] See William Bessette, The Mild Voice of Reason 5-27 (1995).

agencies are not involved.[96] Nothing I have said operates as a defense of canons except insofar as they operate as checks on agency authority. It would be necessary to look elsewhere to justify canons that do not involve an exercise of discretion by administrative agencies. If we lean very hard on the notion of judicially underenforced constitutional norms, we might be able to begin such a justification[97]; but that is a different topic.

Nor have I suggested that the nondelegation canons accomplish precisely the same goals as the old nondelegation doctrine, or for that matter vice versa. There are several important differences. For its defenders, the nondelegation doctrine is supposed to operate as a general or global requirement that Congress make the basic judgments of value.[98] The nondelegation canons have a conspicuously more limited office. Consider, for example, the authority of the Federal Communications Commission to give out broadcasting licenses in accordance with "public interest, convenience, and necessity."[99] Those who believe in the nondelegation doctrine would want to invalidate this authority. By contrast, a nondelegation canon would operate to forbid the FCC to exercise its authority in such a way as to create serious first amendment questions, by, for example, requiring broadcasters to provide free air time for candidates for public office.[100] A ruling to this effect limits FCC discretion, but only in a narrow, targeted way. Certainly a world of nondelegation canons would impose far fewer and weaker constraints on FCC authority than a world in which the nondelegation doctrine were vigorously enforced. Thus those who believe in that doctrine and urge its revival would undoubtedly

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[96] See, e.g., Wisconsin Dept. of Rev v, Wrigley, 112 S Ct 2447, 2457-58 (1992); Citicorp Industrial Credit v. Brock, 483 US 27 (1987); Gregory v. Ashcroft, 111 S Ct 2395 (1991) Hoffman v. Connecticut CIM, 492 US 96 (1989); Californbia v. ARC America, 490 US 93, 101 (1989).

[97] On the general idea, see Lawrence Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1213-28 (1978); on the connection to canons of construction, see Cass R. Sunstein, Law and Administration After Chevron, 90 Colum. L. Rev. 2071 (1990).

[98] See Schoenbrod, supra note; Ely, supra note.

[99] 47 USC 303r.

[100] Cf. Syracuse Peace Council v. FCC, 867 F.2d 654 (DC Cir 1989) (upholding FCC abandonment of the fairness doctrine).

conclude that the nondelegation canons achieve far too little. My basic response to this objection is that the nondelegation canons are far preferable, because they are easily administrable, impose a much less serious strain on judicial capacities, and promise to do more good while also producing less harm.

We have also seen that many people are skeptical of the conventional nondelegation doctrine, and for good reasons.[101] Ought they also to be skeptical of nondelegation canons? Do the objections to the conventional doctrine apply to the contemporary one? Part of the answer depends on the particular canons in question. But insofar as the concern involves judicial competence, the nondelegation canons are far less troublesome, simply because they do not require judges to resolve a hard issue about degree (how much discretion is too much discretion?) and allow judges instead to draw clear lines (for example, if the statute is ambiguous, it may not be applied extraterritorially). Nor do the nondelegation canons create serious risks to the operation of the regulatory state. Their narrower office is to ensure congressional deliberation on issues of great sensitivity. Nothing in the nondelegation canons runs afoul of the reasonable concerns of those who are skeptical about the conventional doctrine.

The most important future debates will involve not the existence or legitimacy of nondelegation canons, but their particular content. Of course the category changes over time. As noted, a core nondelegation canon of the early twentieth century required a clear legislative statement to authorize an interference with common law rights. Of course this canon is no longer reflected in current law. By contrast, the idea that statutes will be construed so as to require de minimis exceptions is relatively new, a creation of the late twentieth century, a self-conscious judicial response to certain problems in regulatory law. It would be easy to imagine the introduction of new canons and the repudiation of current ones. I have attempted to sketch defenses of existing nondelegation canons, in order to understand the basis for the review that the relevant issues may not be resolved bureaucratically. But nothing in the general account depends on whether any particular canons are defensible.

A distinctive objection to the nondelegation canons, as catalogued here, is that they are numerous and potentially unruly,

[101] See, e.g., Mashaw, supra note; Stewart, supra note.

and in that way threaten to produce a complex legal system, one that imposes costs on litigants and those seeking to know the context of the law. By contrast, a simple version of the Chevron principle, allowing agencies to interpret ambiguous provisions, promises to hold down decision costs and also to promote planning. As a general rule, this is an important point about any system of multiple "canons," and it may argue in favor of greater simplicity, and more clarity, than current law provides. In practice, however, the existing system of nondelegation canons does not leave a great deal of uncertainty, except perhaps in the decision (inevitably complex in some cases) whether the statute at issue is ambiguous. In contemporary administrative law, the real lack of clarity comes not from nondelegation canons, but from general uncertainty about Chevron itself, which different courts, and panels, apply with noticeably different degrees of enthusiasm.

V. Conclusion

In this Essay I have argued on behalf of recognizing nondelegation canons as a distinctive feature of modern public law. The function of these canons—the modern nondelegation doctrine—is to ban Congress from authorizing administrative agencies, or the executive branch, from making certain decisions.[102] These canons do not merely operate as nondelegation principles; they are the thing itself. They show that the nondelegation doctrine is alive and well. It has merely been relocated and left unnamed.

My principal point has been descriptive—to help in understanding and unifying a set of outcomes that might otherwise seem puzzling or even incoherent. But there are normative points as well. The nondelegation canons have important advantages over the conventional nondelegation doctrine insofar as they impose fewer strains on judicial capacities and do not threaten, as the conventional doctrine would, to harm rather than improve the operation of the regulatory state. As a class, the nondelegation canons are best defended on the ground that certain decisions are ordinarily expected to be made by the national legislature, with its various institutional

[102] As noted, it is unclear whether the ban is constitutional in status or whether it is merely presumptive, a tool of construction. See above.

safeguards, and not via the executive alone. In this way the nondelegation canons take their place as one of most prominent domains in which protection of individual rights, and of other important interests, occurs not through blanket prohibitions on governmental action, but through channeling decisions to particular governmental institutions, in this case Congress itself.[103]

[103] Compare this idea with the understanding of the equal protection clause as triggering political safeguards through the requirement of generality. See Antonin Scalia, The Rule of Law Is A Law of Rules, 56 U Chi L Rev 1175, 1185 (1989); Railway Express v New York, 336 US 106, 116 (1941) (Jackson, J., concurring).

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